



1300 Pennsylvania Avenue NW, Suite 190-322, Washington, DC 20004

April 20, 2017

Ajit Pai, Chairman
Federal Communications Commission
445 12th Street, SW Washington, DC 20554

Re: GN Docket No. 14-28 – Open Internet Order

Dear Chairman Pai:

Press reports point to imminent Commission action threatening to moot the appeal of the Open Internet Order to the Supreme Court of the United States. I am leading the effort to obtain Supreme Court Certiorari and urge your office to pause any plans likely to restart the madness. The Supreme Court offers the only forum immune to the hysteria and vilification tactics used to coerce your predecessor into extending the ancient Communication Act of 1934 to the Internet. The magnitude of the stakes – the future of communication and a trillion dollar industry – and the experience of four previous FCC Orders point to the Supreme Court as the only means to resolve long standing hostilities.

Nullifying the Open Internet Order in favor of voluntary concessions and Federal Trade Commission enforcement satisfies no one and merely offers a starting gun for a return to bedlam. The timeline coincides with the three year anniversary of the ill-fated May 2014 NPRM and turmoil triggering Title II as the “nuclear option”. Open threats to terrorize you and the decision making process demonstrate no interest in an expert agency weighing merits. A pause deprives the agitators of a target for their Alinsky ad hominem attacks and disruption.

Imposing even “voluntary” constraints on business models requires a burden of proof the supposedly problematic network discrimination exists. I urge you to recognize the 15-year power struggle rests on the pure speculation in the 2003 paper¹ by Columbia University Law School Professor Tim Wu “Network Neutrality, Broadband Discrimination”. The self-evident flaws in premises underlying Professor Wu's arguments deserve long over due scrutiny.

For example, Professor Wu declared as out of scope changes in technology that moot the theory of network discrimination. The original paper includes an Appendix referencing the available bandwidth capacities as 256Kbs to 1.5Mbps for download and less than 256k for upload. The subsequent 50 to 100-fold expansion of routine Internet access (as well as explosion of communication services) proves Professor Wu's anxieties unfounded.

The Wu paper and the entire subsequent debate relies on a presumption of service provider market power. An expansion of communication value leading the entire economy illustrates dynamics unanticipated by Professor Wu. A fixed cost infrastructure motivates extremely aggressive customer

¹ Wu, Tim, Network Neutrality, Broadband Discrimination. Journal of Telecommunications and High Technology Law, Vol. 2, p. 141, 2003. Available at SSRN: <https://ssrn.com/abstract=388863> or <http://dx.doi.org/10.2139/ssrn.388863>

acquisition, because incremental new customers represent almost pure profit. The captive customer narrative is at odds with the fact AT&T, Verizon, and Comcast rank as three of the top five companies in advertising spending. Monetizing a fix cost network also requires aggressive efforts to expand usage and adoption as demonstrated by the expansion of communication devices and options since 2003. The real world communication landscape simply lacks evidence of the problematic network discrimination supposedly requiring regulatory intervention.

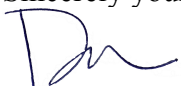
The concept of "neutrality" Professor Wu offers as the purpose of Internet regulation does not submit to either objective measurement or regulatory enforcement. Professor Wu points to electrical utilities as the exemplar for "neutrality", but no one – not operators or regulators – view electrical networks in the context of “neutrality”. The electrical network supports a multiplicity of devices by virtue of "uniformity" at least on a country by country basis. Comprehensive standards mechanisms already give the Internet far greater degree of uniformity – supporting a multiplicity of devices - than the electrical network. The absence of examples of “non-neutral” behavior requiring exposes the entire exercise as irrelevant from the perspective of the communicating public.

Professor Wu and other champions of Internet regulation make no demonstration of a regulatory means to impose “neutrality”. Professor Wu admits neutrality “as a concept, is finicky,...” and just arbitrarily assumes feasibility of efficient regulatory intervention. One can properly insert “magic” every time the conversation reaches the question of implementation. Advocates energize discontent by setting up a false dichotomy weighing regulatory intervention against corporate virtue (including customer service and all other grievances). This presumes an entirely unrealistic god like view of regulatory powers. It ignores the expansion of communication options the public leverages to impose its will directly as in the recent the United Airlines debacle.

As an entrepreneur, I am ignored by-catch of the unrelenting campaign to regulate the Internet. The failure of regulatory model to increase voice quality since 1934 illustrates the problem of extending Title II to the Internet. The massive decade plus engagement of the entire regulatory industrial complex around “neutrality” made no difference at all to the actual communication experience of the public. The cause of high definition (HD) voice - which directly effects end user experience - never emerged as a consideration during 80 years of Title II voice services regulation.

The public enjoys a self-evident degree of communication abundance supposed network discrimination should have made impossible. The champions of Title II make claims about the bleakness of the communication landscape even while leveraging the proliferation of options as the basis for their advocacy. Commission action now merely resets the clock back to May 2014 and events setting up yet another cycle through the DC Circuit Court of Appeals. It delays final resolution by the Supreme Court to 2020 or beyond. As an exercise of agency power, a new Order places the champions of Internet independence on the wrong side of a Supreme Court with Justice Gorsuch and 5-4 conservative majority.

Sincerely yours,

A handwritten signature in blue ink, appearing to be 'Dn' or 'Daniel Berninger'.

Daniel Berninger, founder, VCXC